81449-0

NO. 81449-0

**THE SUPREME COURT**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT/CROSS-PETITIONER,

v.

NEIL GRENNING, PETITIONER

Court of Appeals Cause No. 32426-1
Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 02-1-01106-5
No. 03-1-05025-5



# AMENDED ANSWER TO PETITION FOR REVIEW (and cross-petition)

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A. IDENTITY OF PETITIONER.

The State of Washington, respondent below, asks this court to accept review of the Court of Appeals' decision reversing the defendant's 20 convictions of possession of depictions of minors engaged in sexually explicit conduct, and to affirm the Court of Appeals' decision regarding all of the defendant's remaining convictions.

B. COURT OF APPEALS DECISION.

The State seeks review of the unpublished opinion, filed on January 8, 2008, in State of Washington v. Neil Grenning, in COA #32426-1-II (consolidated with #32456-3-II). *See* Appendix "A." The State respectfully requests that this court review the Court of Appeals' decision reversing the defendant's 20 convictions of possession of depictions of minors engaged in sexually explicit conduct, but to affirm the Court of Appeals' decision affirming the defendant's other convictions for sexual exploitation of a minor, first degree child molestation, second degree assault of a child with sexual motivation, and first degree attempted child rape. Review is appropriate under RAP 13.4(b)(1), (3), and (4).

C. ISSUE PRESENTED FOR REVIEW.

1. Did the Court of Appeals act in conflict to an opinion of this court when it reversed 20 convictions for possession of depictions of minors engaged in sexually explicit conduct when it found, without any showing of prejudice, that the defendant was entitled to possession of a

mirror image hard drive outside the police facility, and does this issue raise a significant question of law under the Washington constitution and involve an issue of substantial public interest?

2. Does the defendant's exceptional sentence comply with ***Blakely*** when the State pleaded in the Information and proved at trial to the jury beyond a reasonable doubt that the defendant had committed 21 offenses with the aggravating factor of sexual motivation?

3. Did the Court of Appeals properly determine that the search of the defendant's computer was timely?

4. Did the Court of Appeals properly affirm the trial court's ruling that there was probable cause to support the issuance of the warrant and that the warrant was not overbroad?

5. Did the Court of Appeals properly find that the evidence was sufficient to support the defendant's convictions for possession of depictions of minors engaged in sexually explicit conduct?

6. Did the Court of Appeals properly find that any possible ***Crawford*** violation was harmless?

7. Is the defendant's sentence constitutional and did the Court of Appeals properly find that it did not constitute cruel or unusual punishment?

D. STATEMENT OF THE CASE.

A statement of facts regarding the underlying charges is contained in the State's response brief and supplemental brief filed in the Court of Appeals below.

On January 8, 2008, the Court of Appeals issued a published opinion reversing the defendant's 20 convictions for possession of depictions of minors engaged in sexually explicit conduct and affirming all of the defendant's other convictions. Appendix "A." With respect to

the 20 convictions the Court of Appeals reversed, the Court of Appeals found that reversal was required under this court's analysis in ***State v. Boyd***, 160 Wn.2d 424, 158 P.3d 54 (2007). The State seeks review of that portion of the court's decision.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS ERRED IN REVERSING 20 OF THE DEFENDANT'S CONVICTIONS WITHOUT ANY SHOWING OF PREJUDICE TO THE DEFENDANT, THAT HE WAS ENTITLED TO POSSESSION OF MIRROR IMAGE HARD DRIVES OUTSIDE OF THE POLICE FACILITY.

In this case the defendant raised the claim that counsel was ineffective with regard to discovery and expert analysis of the mirror images of the hard drives. Supplemental brief of Appellant at page 10; Appendix "A" at page 12. A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

In ***State v. Boyd***, 160 Wn.2d 424, 158 P.3d 54 (2007), the court addressed the defense's pretrial request for copies of the State's child

pornography evidence, including mirror images of the computer hard drive at issue. The procedural posture of ***Boyd***, however, differs from the case at bar. In ***Boyd***, the parties sought relief from the court before trial. *Id.* at 430-431. In the present case, the defendant sought relief after conviction, and in the context of an ineffective assistance of counsel claim. The defendant in the present case, therefore, must have established that the result of the trial would have been different. *See* ***State v. Thomas***, *supra*. The defendant clearly did not meet this requirement.

The defendant claimed that no expert was willing to go view the evidence, but provides no citation in his brief to substantiate such a claim. Second, the defendant did have an expert of his choosing—Mr. Apgood. While he did not testify at trial, it could easily have been because his findings were not helpful to the defense. The record does not support that he did not assist the defense in preparing for trial. In his affidavit to the court, Mr. Apgood never indicated that the protective order precluded him from doing his job. CP 601-609.

a. <u>The trial court's ruling was merely tentative.</u>

In the present case, the trial court entered a tentative order allowing the defendant's attorney access to the mirror-image hard drive copies inside a Tacoma police facility. The trial court specifically told the defendant to inform the court if the protective order was unworkable. RP 3/26/04 at 84-85. The defendant never indicated that he was unable to

work within the confines of the tentative ruling. Any objection to the court's protective order was waived by the defendant's failure to seek a final ruling. *See* ***State v. Riker***, 123 Wn.2d 351, 369, 869 P.2d 43 (1994), *citing* ***State v. Carlson***, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022 (1993).

b. The defendant failed to show any prejudice and a harmless error analysis applies.

The defendant in the present case also cannot show any prejudice. The defendant did not ever indicate to the court that he was unable to work within the confines of the protective order. The defendant also has not made any showing that his expert was unable to do the testing he wanted to do at the State facility. The defendant has not articulated what tests his expert would have liked to perform, and but for the protective order, was unable to conduct. The defendant has not established that his expert would have done anything different. When an asserted error is a violation of a court rule, rather than a constitutional violation, a harmless error analysis applies[1]. ***State v. Robinson***, 153 Wn.2d 689, 697, 107 P.3d 90

[1] The defendant asserted that any error here was presumptively prejudicial and the record cannot show harmlessness of any error because the defendant was "completely denied the discovery." Supp. Brief of Appellant at p. 19. It appears the Court of Appeals agreed with the "presumptively prejudicial analysis." The Court of Appeals did not articulate why any error here is not subject to a harmless error analysis.

(2005), *citing* ***State v. Templeton***, 148 Wn.2d 193, 220, 59 P.3d 632 (2002).

The Court of Appeals cited to ***Boyd*** for the proposition that expert analysis requires greater access than can be given at a State facility. Appendix "A" at page 13. In ***Boyd***, however, the court does not preclude a harmless error analysis. The allegation in the present case was not that the defendant was denied access to the discovery, but rather that he was denied his own personal mirror images of the hard drives away from the secured location. Any error that occurred by the court's failure to order that mirror image hard drives be produced constitutes a violation of CrR 4.7, not a constitutional violation. Under ***Robinson***, *supra*, such court rule violation is subject to a harmless error analysis.

In this case, any violation of CrR 4.7 was harmless. As argued above, the defendant cannot establish prejudice. The trial court instructed the defendant that if the protective order was not workable, to advise the court. The record is void of any subsequent requests from the defendant to modify the protection order. The defendant also has not established that he was unable to present his defense based on the protection order that was issued.

Finally, the nature of the defendant's defense in this case is further evidence that the result of the trial would not have been any different if a mirror image hard drive had been given to the defense. In the present

case, the defendant's defense was that of general denial. The defendant contested the number of counts the State had charged, not that the photos have been altered in any way. Therefore, even if the defendant had been granted his own personal mirror image hard drives to examine away from police headquarters, he cannot establish that he would have done anything different, that he was prejudiced, or that the outcome of the case would have been different.

The defendant seeks review under ***Boyd*** for the Court of Appeals' failure to dismiss all of the charges, not only the charges of possession of depictions of minors engaged in sexually explicit conduct. Pet. for Review at page 16. The analysis as stated above is applicable to the defendant's claim. As argued above, the defendant cannot show prejudice with respect to any of the convictions and is not entitled to relief under ***Boyd***.

The State asserts that review is appropriate under RAP 13.4(b)(1), (3), and (4). The Court of Appeals' decision is in conflict with decisions of this court in that a showing of prejudice by the defendant should be required before the defendant is entitled to relief. This issue also raises a significant question under the Washington constitution and an issue of substantial public interest. This court should grant review with respect to the sexual exploitation convictions, and deny review as to the remaining convictions.

2. THE DEFENDANT'S EXCEPTIONAL SENTENCE IS VALID UNDER ***BLAKELY***, AND THEREFORE THIS COURT SHOULD DECLINE TO ACCEPT REVIEW.

The defendant argues his sentence should be reversed under ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). This argument should be rejected. In ***Blakely***, the Court held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" ***Blakely***, 124 S. Ct. at 2536 (quoting ***Apprendi v. New Jersey***, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

The defendant argues that the Court of Appeals erred in relying on RCW 9.94A.712, because the charging period partially predated the effective date of the statute. Pet. for Review at page 10. While the State agrees that the Court of Appeals' reliance on RCW 9.94A.712 is misplaced, the defendant is still not entitled to relief and therefore this court should not accept review.

First, while the Court of Appeals stated that the defendant was sentenced under RCW 9.94A.712, the judgment and sentence indicates that the defendant was actually sentenced under RCW 9.94A.589. CP 550-576. It is apparent that the defendant was not sentenced under 9.94A.712 for two reasons—first, the judgment and sentence states that the defendant is being sentenced under RCW 9.94A.589, and second, the

defendant received standard range sentences, not an indeterminate sentence per RCW 9.94A.712. The Court of Appeals did err in finding that the defendant was sentenced under RCW 9.94A.712. However, as argued below, the court's conclusion is correct and therefore this court should deny review and, if deemed appropriate, remand for the Court of Appeals to consider the issue applying the RCW 9.94A.589.

The Court of Appeals' affirmation of the defendant's exceptional sentence is correct, and therefore this court should deny review. The trial court found a number of factors warranted an exceptional sentence. The State conceded below that the first two factors used by the trial court—that the sentence would be clearly too lenient and that his conduct was more egregious that the typical case—were problematic under ***State v. Hughes***, 154 Wn.2d 118, 110 P.3d 192 (2005).

The third factor relied on by the trial court, however, remains valid under ***Blakely*** and ***Hughes***. The jury found the defendant guilty of assault of a child in the second degree, and it returned a special verdict that this crime was committed with sexual motivation. CP 510. The jury found the defendant guilty of 20 counts of possession of depictions of minors engaged in sexually explicit conduct, and it returned a special verdict finding that the defendant committed each of these crimes with sexual motivation. CP 490-509. The jury's findings of sexual motivation are valid aggravating factors under ***Blakely*** and ***Hughes.***

Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing. ***State v. Cardenas***, 129 Wn.2d 1, 12, 914 P.2d 57 (1996). In its written findings and conclusion, the trial court emphatically stated that it would impose the same sentence even if only one factor was found valid. CP 548-59 (emphasis added). Where the trial court makes factual findings supporting several aggravating factors and states that any one of those factors would warrant the exceptional sentence, the exceptional sentence can stand so long as one of those factors is valid. ***Hughes***, 154 Wn.2d at 135 (*citing* ***State v. Jackson***, 150 Wn.2d 251, 276, 76 P.3d 217 (2003)). In this case, the jury entered 21 special verdicts finding sexual motivation, and these special findings support the trial court's exceptional sentence.

Therefore, while the Court of Appeals erred in finding that the defendant was sentenced under RCW 9.94A.712, it did not err in affirming the defendant's exceptional sentence. This court should therefore deny review and, if it deems appropriate, direct that the Court of Appeals conduct an analysis of this issue under RCW 9.94A.589.

3. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE SEARCH OF THE DEFENDANT'S COMPUTER WAS TIMELY.

The defendant argues that the detectives were required to search all the defendant's computer's files within the 10-day limit contained in CrR 2.3. The conduct of law enforcement officers in executing a search warrant is governed by the Fourth Amendment's mandate of reasonableness. ***United States v. Hargus***, 128 F.3d 1358, 1363 (10th Cir. 1997), *cert. denied*, 523 U.S. 1079 (1998). The Fourth Amendment does not provide a specific time in which an item, such as a computer, may be subjected to a government forensic examination after it has been seized pursuant to a search warrant. *See* ***United States v. Hernandez***, 183 F. Supp. 2d 468, 480 (D.P.R. 2002).

The defendant argues that the search violated CrR 2.3(c) because the search of the computer was not completed within 10 days of the warrant's issuance. This argument should be rejected because CrR 2.3 did not require that the search of the computer's contents be completed within 10 days.

CrR 2.3(b)(1) provides that "[a] warrant may be issued under this rule to search for and seize any . . . evidence of a crime." Under CrR 2.3(c), a warrant "shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified." The "person, place or thing" that the warrant "specified" for the search within 10 days was the defendant's *home*, not his computer. The warrant did not require the officers to complete the search of the *computer* within ten days. There is no case law

supporting the defendant's contention that an item lawfully seized pursuant to a valid search warrant must itself be "searched" within 10 days under CrR 2.3.

Even if the court were to somehow find that CrR 2.3 required the search of the computer to be completed within 10 days, the defendant is not entitled to relief. A search can be deemed timely within CrR 2.3(c)'s time requirement if the search begins before the warrant expires and probable cause continues to exist through the completion of the search. ***State v. Kern***, 81 Wn. App. 308, 311, 914 P.2d 114, *review denied*, 130 Wn.2d 1003 (1996). Absent constitutional considerations, the rules for execution and return of a warrant are essentially ministerial in nature, and suppression will be ordered as a remedy for violation only where prejudice can be shown. ***Kern***, 81 Wn. App. at 311-12.

As stated above, this case does not involve Fourth Amendment concerns. The trial court concluded that probable cause continued during the entire course of the search. CP 94. The defendant does not contest this finding. Nor did the defendant contest the trial court's finding that the police did not act in bad faith in executing the warrants or in reviewing the evidence seized. CP 93.

Even if the court were to find non-compliance in this case, non-compliance with CrR 2.3 does not invalidate a warrant or otherwise require suppression of evidence absent a showing of prejudice to the defendant. ***Kern***, 81 Wn. App. at 311. The defendant conceded before the

trial court that he was not prejudiced by the length of time required by the search of the imaged drives. CP 43. Nor did he argue on appeal that he suffered any prejudice. There is no basis for assuming that any evidence contained in the computer was lost or otherwise altered during the time period encompassing the search. The defendant cannot establish he was prejudiced by the length of time taken to examine the computer's contents. The court should deny review of this issue.

4. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S RULING THAT THERE WAS PROBABLE CAUSE TO SUPPORT THE ISSUANCE OF THE WARRANT AND THE WARRANT WAS NOT OVERBROAD.

Under the Fourth Amendment, a warrant may be issued only upon a showing of probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. ***State v. Maddox***, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity, and that evidence of the criminal activity can be found at the place to be searched. ***State v. Thein***, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Accordingly, "probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." ***Thein***, 138 Wn.2d at 140 (quoting ***State v. Goble***, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

Detective Baker's affidavit, which was dated March 5, 2002, established probable cause for the issuance of the initial search warrant. This affidavit established a nexus between the defendant's criminal activity and the items to be seized, which included defendant's computer, digital camera, and computer data storage devices.

In this affidavit, Detective Baker stated that on March 3, 2002, R.W. told his mother that the defendant had put something in R.W.'s anus, and R.W. was trying to get it out with a toothbrush. CP 49. R.W. showed his mother a jar of Vaseline and told her: "This is what Neil had put on his pee pee and put in my butt." CP 49. R.W.'s mother told the police that she knew that the defendant had given R.W. a bath on one occasion. CP 49. She also told them that the defendant had showed her a digital picture that he had taken of R.W. in which R.W. was fully clothed. CP 50. She asked R.W. if the defendant had taken pictures of him, and R.W. answered in the affirmative and also indicated the defendant took pictures of R.W. naked. CP 50. Baker's affidavit also indicated that R.W. disclosed to Dr. Duralde that the defendant had touched R.W.'s penis and buttocks area. CP 51.

The officers interviewed the defendant and he confirmed that he had given R.W. baths on five occasions, that he would touch R.W's buttocks and genitals while washing R.W., and that he gave R.W. a CD, which R.W. placed around R.W's penis. CP 49-50. The defendant told the officers that he keeps K-Y lubricant next to his computer for personal

use, stating "it was more enjoyable to do that while sitting at the computer." CP 50. Detective Baker indicated in his affidavit that based on his training and experience, he had knowledge that pedophiles use computers and digital cameras to photograph and store sexually explicit images of children. CP 51.

In evaluating an affidavit, the court is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. ***In re PRP of Yim***, 139 Wn.2d 581, 596, 989 P.2d 512 (1999). Warrants must be read in a common sense and practical fashion and not in an overly-technical manner. *See* ***United States v. Ventresca***, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965). Detective Baker's affidavit established probable cause to believe that the defendant had raped R.W. by placing his penis in R.W.'s anus, and that the defendant had taken digital images of R.W. naked. The facts and circumstances allow for reasonable inferences that any such images could be related to the defendant's sexual assault on the victim, and that such images could have been stored or downloaded into the defendant's computer or other data storage devices. The defendant kept sexual lubricant next to his computer for the apparent purpose of masturbating while viewing pornographic items stored on his computer. The affidavit established probable cause and particularity, *i.e.*, a nexus between the defendant's criminal conduct and the items to be seized.

In determining whether the particularity requirement is satisfied, the court is entitled to place a great deal of weight on whether the warrant is as particular as reasonably could be expected under the circumstances. *See* ***Andresen v. Maryland***, 427 U.S. 463, 480 n.10, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). Here, the warrant was as particular as reasonably could be expected given the complexity of the search, the crimes under investigation, and the nature of the evidence sought. "Computer records are extremely susceptible to tampering, hiding, or destruction, whether deliberate or inadvertent." ***United States v. Hunter***, 13 F. Supp.2d 574, 583 (D. Vt. 1998). Images can be hidden in all manner of files. Contraband can be concealed simply by changing the names and extensions of files to disguise their content from the casual observer. The affidavit established probable cause and was not overly broad, and therefore review should be denied.

5. THE COURT OF APPEALS PROPERLY FOUND THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTIONS FOR POSSESSION OF DEPICTIONS OF MINORS ENGAGED IN SEXUALLY EXPLICIT CONDUCT.

Due process requires that the State bear the burden of proving each element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The applicable standard of review is whether, after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

A defendant is guilty of possession of depictions of a minor engaged in sexually explicit conduct if he or she knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct. RCW 9.68A.070. A "minor" is defined as "any person under eighteen years of age." RCW 9.68A.011(4). "Visual or printed matter" means any photograph or other material that contains a reproduction of a photograph. RCW 9.68A.011(2). The term "photograph" includes making a "digital image." RCW 9.68A.011(1). The term "sexually explicit conduct" includes actual or simulated sexual intercourse, penetration of the rectum by any object, masturbation, sadomasochistic abuse for the purpose of sexual stimulation by the viewer, exhibition of the rectal area of any minor for the sexual stimulation of the viewer, and

the touching of a person's clothed or unclothed genitals for the sexual stimulation of the viewer.

The images found in Exhibit 94 through 114 depict "sexually explicit conduct" squarely within the specific meaning of RCW 9.68A.011(3). The defendant does not contest this fact.

Nor does he dispute that each image depicts children under the age of 18 engaging in sexually explicit conduct, including some who are clearly infants. His sole contention is that the evidence is not sufficient to show that he knew that the images were stored in his computer.

The computer at issue was located in the defendant's bedroom. RP 510. While he had roommates, these other roommates each had their own computers. RP 510. The police searched the roommates' computers, and no pornographic images were found. RP 510-11. In fact, the defendant's chat with "tjerkenson" contained in Exhibit 140 indicates that the roommates likely had no knowledge of the defendant's activities involving pornography. Early in the chat, the defendant had to break off the chat because one of his roommates had inadvertently entered the room, needing to check his e-mail on the defendant's computer. Exhibit 140.

It is undisputed that the defendant stored a large number of pornographic images that he had personally taken of R.W. and G.H. in his computer. In addition, the detective recovered somewhere between

35,000 and 40,000 images involving minors engaged in sexually explicit conduct from the defendant's hard drive. RP 517. Some of these images, such as those depicted in Exhibits 94 through 114, are commercial child pornography. RP 517.

Police detectives interviewed the defendant and specifically asked him whether he had any pornographic images on his computer. RP 401. In response, the defendant stated that his computer was an older computer, but he admitted knowledge that there may be some "old stuff", *i.e.* pornography, in the computer. RP 401 (emphasis added). The defendant also admitted to the detectives that he kept a tube of personal lubricant, K-Y- jelly, near his computer for his own personal use while he was at the computer. RP 351. In the light most favorable to the State, these admissions to the detectives indicate the defendant knew that the pornography at issue was stored in his computer. The interview with the detectives occurred on March 4, 2002. CP 390, 393. The State charged in the information that on or about March 3, 2002 the defendant knowingly possessed the images. CP 351-59.

The evidence is sufficient to establish that the defendant had knowledge that on or about March 3, 2002, his computer contained the images of commercial child pornography at issue in this case. The Court of Appeals properly found that there was sufficient evidence, and therefore review on this issue should be denied.

## 6. THE COURT OF APPEALS PROPELRY FOUND THAT A *CRAWFORD* VIOLATION, IF ANY OCCURRED, WAS HARMLESS.

The Confrontation Clause generally precludes admission of a testimonial hearsay statement unless the defendant has had a prior opportunity to cross-examine the declarant. ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177 (2004). The ***Crawford*** Court declined to provide a comprehensive definition of "testimonial," but gave the following examples of testimonial statements: ex parte in court testimony, and its functional equivalents, such as affidavits, custodial examinations, prior testimony that the defendant has not had the opportunity to cross-examine, and pretrial statements that declarants would reasonably expect to be used prosecutorially. ***Crawford***, 124 S. Ct. at 1364.

In this case, Dr. Duralde's purpose in questioning R.W. was for the medical treatment and diagnosis of her patient. RP 836. Duralde is employed by Mary Bridge Hospital. RP 825-26. She is not a governmental employee. While the police and prosecutor sometimes refer patients to her, she also receives referrals from private physicians and parents. RP 831. While the police referred R.W. to her, there is no indication the police had any involvement in her examination of R.W.

R.W's statements were nontestimonial under ***State v. Fisher***, 130 Wn. App. 1, 108 P.3d 1262 (2005) and ***Crawford***.

The court admitted R.W.'s statements to Dr. Duralde under ER 803(a)(4). The medical treatment exception applies to statements reasonably pertinent to diagnosis or treatment. ***In re Dependency of Penelope B.***, 104 Wn.2d 643, 656, 709 P.2d 1185 (1985). To be admissible under this rule, the declarant's apparent motive must be consistent with receiving treatment, and the statements must be information on which the medical provider reasonably relies to make a diagnosis. ***State v. Lopez***, 95 Wn. App. 842, 849, 980 P.2d 224 (1999). The trial court's admission of testimony under the medical treatment exception is reviewed under the abuse of discretion standard. ***State v. Wood***, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001).

The trial court acted within its discretion in admitting R.W.'s statements under this exception to the hearsay rule. R.W.'s statements were made consistent with the motive to receive treatment. When the doctor asked R.W. if he had any "owies," R.W. indicated that his stomach hurt. The trial court stated that this "lends some support to a belief that [R.W.] knew to tell the doctor what it is that was wrong with him," and that this would support a finding that he had a motive to be truthful. RP 822. R.W.'s statement regarding the abuse is information on which a

medical provider would reasonably rely to make a diagnosis. The trial court acted within its discretion in admitting these nontestimonial statements under the medical diagnosis or treatment exception.

While questioning the defendant regarding the offenses, the officers confronted him with R.W.'s allegations. The court did not admit the officer's testimony recounting R.W.'s allegations for the truth of the matter asserted. Instead, the jury was specifically instructed that this evidence of R.W.'s statements was presented for the limited purpose of explaining what questions were asked to the defendant by the officers. CP 364: Court's Instruction to the Jury 8(a). The jury was instructed not to consider the evidence for any purpose except to explain what questions the officers asked the defendant. The jury is presumed to have followed the court's instructions. ***State v. Grisby***, 97 Wn.2d 493, 497, 647 P.2d 6 (1982).

Even if the court were to find that admission of R.W.'s statements through Dr. Duralde or the officers violated the Confrontation Clause, any such error is harmless beyond a reasonable doubt. The State bears the burden of showing constitutional error was harmless. ***State v. Easter***, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). An appellate court will find constitutional error harmless if it is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result absent the

error, and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. ***Easter***, 130 Wn.2d at 242; ***State v. Aumick***, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995).

The evidence at issue pertained only to the counts involving R.W. The counts involving B.H. or the possession of child pornography are not at issue in this claim. The evidence of the defendant's guilt with respect to all the counts involving R.W. was overwhelming. Each of these counts was supported by graphic photographs the defendant took while committing the crimes against R.W. R.W.'s face and the defendant's face appear in many of the photographs; and objects in his room, such as the defendant's bed, are consistent throughout the photographs. R.W. stated to Dr. Duralde that the defendant had touched him, and he told his mother that the defendant had inserted Vaseline into his rectum. These acts were documented by the images. Even absent R.W.'s statements, the remaining "untainted" evidence in the form of these images was overwhelming.

The evidence of the sexual abuse inflicted on R.W. is overwhelming based on the images presented at trial. Any error in admitting R.W.'s statement that the defendant had touched him or inserted an object into his rectum was harmless beyond a reasonable doubt in view of this graphic evidence. Because the Court of Appeals properly found

that any possible ***Crawford*** violation was harmless, this court should deny review.

7. THE DEFENDANT'S SENTENCE IS NOT UNCONSTITUTIONAL, AND DOES NOT CONSTITUTE CRUEL OR UNUSUAL PUNISHMENT.[2]

The Eighth Amendment prohibits "cruel and unusual" punishment, and article I, section 14 of the Washington Constitution prohibits "cruel" punishment. The prohibition in the Washington Constitution affords greater protection than its federal counterpart. ***State v. Manussier***, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); ***State v. Fain***, 94 Wn.2d 387, 392, 617 P.2d 720 (1980). Therefore, if a statute does not violate the more protective state constitutional provision, it does not violate the federal constitution. ***State v. Rivers***, 129 Wn.2d 697, 712, 921 P.2d 495 (1996); ***State v. Thorne***, 129 Wn.2d 736, 772-73, 921 P.2d 514 (1996).

A sentence violates article I, section 14 when it is grossly disproportionate to the crime committed. ***State v. Morin***, 100 Wn. App. 25, 29, 995 P.2d 113, *review denied*, 142 Wn.2d 1010 (2000). In order to determine whether a sentence is grossly disproportionate, the court considers four factors: 1) the nature of the offense; 2) the legislative

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[2] As argued above, the defendant did not receive an indeterminate sentence under RCW 9.94A.712. Therefore, this court need not reconsider its decision in ***State v. Clarke***, 156 Wn.2d 880, 134 P.3d 188 (2006), as the defendant requests.

purpose behind the statute; 3) the punishment the defendant would have received in other jurisdictions; and 4) the punishments imposed for other offenses in the same jurisdiction. ***Fain***, 94 Wn.2d at 397. These are merely factors to consider and no one factor is dispositive. ***State v. Gimarelli***, 105 Wn. App. 370, 380-82, 20 P.3d 430, *review denied*, 144 Wn.2d 1014 (2001).

The ***Fain*** factors indicate that in this case, the defendant's sentence of 1,404 months for 71 felony convictions involving sexual crimes against children, including 22 convictions for first degree rape and first degree child molestation, is not grossly disproportionate. This court should deny review of this issue.

F. CONCLUSION.

For the above stated reasons, the State respectfully requests that the court accept review of the Court of Appeals' reversal of the defendant's 20 convictions for possession of depictions of minors engaged in sexually explicit conduct, and deny review with respect to the remainder of the Court of Appeals' opinion.

DATED: MAY 12, 2008

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